Supreme Court, U.S.
FILED
JUL 15 1998
OFFICE OF THE CLERK

(3)

No. 97-1961

In the Supreme Court of the United States

October Term, 1997

Peter Castellano, et al.,

Petitioners,

v.

The City of New York, et al.

Respondents.

Petition For A Writ Of Certiorari
To the United States Court of Appeals
For the Second Circuit

PETITIONERS' REPLY BRIEF

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July 13, 1998

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REPLY ARGUMENT

Point I: The Second Circuit assumed without deciding that the Petitioners are 'qualified individuals' within the meaning of the ADA provisions; the decision does not embrace the res judicata or collateral estoppel attributes of a prevailing party.

The municipal respondents in their brief, p. 12, suggest that the Petition for certiorari should be denied with respect to the threshold question of the standing under the Americans with Disabilities Act [ADA] of the Petitioners to seek post-employment fringe benefits because the Petitioners prevailed on the issue in the 2d Circuit. At p. 13 they further contend that because the Petitioners prevailed they are using the conflict among the courts of appeals as a 'dubious strategy' and that that this Court to review as an 'afterthought'.

The most compelling basis for granting the petition is the existence, as here, of a conflict among the circuits. The rules do not state that a 'prevailing party' on the point cannot seek certiorari on the point especially when the 'prevailing party' did not ultimately prevail in the case. On p. 12 of their brief the municipal respondents correctly observe that at A34 that the Court of Appeals assumed that petitioners were qualified individuals under the ADA without deciding the issue.

This state of affairs does not amount to a final prevailing on the threshold question either by eliminating the conflict among the circuits or by conferring upon the Petitioners the essential elements of res judicata or collateral estoppel.

For example, should the Petitioners or others in other circuits now be, or in the future become, aware of other post-employment fringe benefits such as cost of living allowances, tax consequence benefits, medical insurance amendments or the like, the decision would be persuasive but not t preclusive on the threshold question of qualified individual under the ADA.

Meanwhile the conflict among the circuits would continue to fester precipitating further litigation and anguish until someday the matter is resolved by this Court. It is suggested that in the interest of stability that that someday is now.

As officials of New York State it is in the interest of the municipal and state respondents to exonerate their duty to see to it that the following issues are resolved by this Court.

A. Whether former employees who are perceived to be disabled are 'qualified individuals' under the ADA who have standing to seek post-employment fringe benefits, and,

B. Whether a circuit court is authorized to reject the construction of state law by a state's highest court, when it does not violate federal law.

Contention A: The 2d Circuit held:

> ...We hold that a former employee with a disability who 'with or without reasonable accommodation' could 'perform the essential functions of the employment position' for a period sufficient to establish entitlement to an employer-related fringe benefit (i.e.., who is otherwise entitled to receive a fringe benefit) is a 'qualified individual with a disability' within Title I of the ADA for the purpose of challenging alleged discrimination in the provision of that fringe benefit. (A34)

It is to the benefit the nation in having the conflict among the circuits resolved because of various important factors including:

1) The 2d Circuit has held that former employees who are perceived to be disabled have standing as qualified individuals under the ADA to seek post-employment fringe benefits. It is expected that disability retirement individuals in the 2d Circuit

[foreseeably including any surviving Petitioners] and other circuits will rely on this case as persuasive but not dispositive precedent in mounting future litigation, not in the state courts but in federal district courts. If this Court later overrules the 2d Circuit in another case, all those cases will be dismissed, resulting in unnecessary expenditure of court resources when the condition could have been eliminated by ruling at this juncture.

2) In the event this court at a later time upholds the 2d Circuit holding that former disabled employees have standing under the ADA as qualified individuals to seek post-employment fringe benefits, the state officials on a nationwide basis would not, in the intervening period, have had the benefit of a binding decision of this Court upon which to structure their programs and policies to conform to those ADA requirements. This would expose on a national basis those various state entities to future liabilities which would be avoided by a resolution of the conflict now.

In the event that the respondents are content to leave the threshold issue of standing as a qualified individual under the ADA binding on them and not considered by this Court, then it should constitute the 'law of the case' irrespective of any future action by this Court which may overrule the 2d Circuit's holding on

this issue in a later case. Moreover, when this case is remanded by reason of reversal by this Court on one or more of the other points in the petition, the respondents upon a loss in the lower courts on the merits the respondents should not be permitted to seek certiorari on the threshold issue of whether the Petitioners are or are not 'qualified individuals under the ADA, even if this Court in the intervening period determines that such persons are not qualified to seek post-employment fringe benefits.

Contention B: It is a matter of nationwide importance that state officials maintain the authority of the highest courts of the various states to define issues of state law, and to have that definition respected by and binding on all other state and federal courts.

It is the duty of the federal judiciary to afford litigants a meaningful right to petition for redress of grievances, which has the element of due process of law. Important elements of due process were denied the Petitioners by the courts below.

1. It is clearly established law and an element of due process that when a state's highest court construes a a state statute, such definition is binding on all other courts including the United States Supreme Court. This concept has been engrafted upon the

jurisprudence of the nation since as early as 1842 in Swift v Tyson, 41 US 1 (1842) and found expression later in Erie Railroad Co. v Tompkins,304 U.S. 64 (1938). See also: Moore v Ill. Cent. Ry. Co., 312 US 630(1941); Wainwright v Stone, 414 U.S. 21 (1973); Minnesota ex Rel Pearson v. Probate Court of Ramsey Co., 309 U.S. 270 (1940); Wick v Chelan Elec. Co., 280 U.S. 108 (1929); and J. Bacon & Sons v Martin, 305 U.S. 380 (1939).

The 2d Circuit at A39 verified awareness of the New York Court of Appeals case of Gagliardo v Dinkins, 89 NY2d 62, 574 NE 2d 298 (1996) construing the Variable Supplement Fund benefit as deferred compensation for services actually performed and not as a pension benefit.

The 2d Circuit had no authority to reject the binding effect of the Gagliardo VSF definition. By reason of this rejection it demonstrably deprived the petitioners of an important provable element of their case: that they were not being paid for work done because they retired on disability, and that the mode of retirement had no relevance to the fact that they were entitled to be paid for services rendered on the job.

No law in the country can be upheld which deprives a worker of wages for services performed without being considered a confiscation of property or the imposition of a condition of

involuntary servitude.

Were the VSF a pension benefit and not compensation for work performed while on the job, then arguably, but not to the degree of a 12(b)(6) dismissal, the mode of retirement would have some limited relevance.

What makes this stance by the 2d Circuit so overwhelmingly distressing is that in the case of Castellano et al v Bd. of Trustees, et al, 737 F.2d 759 (2d Cir. 1991, cert denied 502 U.S. 941 (1991) referred to in the decision and Petitioners' brief as 'Castellano I', many Petitioners here were plaintiffs, and the 2d Circuit specifically deferred to the N.Y. Court of Appeals to define the nature of the VSF benefit.

Now that the Petitioners have returned to the 2d Circuit with the authoritive and binding definition by the N.Y. Court of Appeals,the 2d Circuit, placing itself even above the Supreme Court of the United States, flat out refused to be bound by that definition. This presents a situation of constitutional and procedural chaos worthy of intervention by this Court.

If the definition is federally unconstitutional or violative of federal laws then theoretically it can be struck, which is not the case here.

Due process of law is a necessary component to the right to petition for

redress of grievances under the 1st Amendment. The petitioners are entitled to have the definition of the VSF benefit by the N.Y. Court of Appeals accepted by the 2d Circuit. The refusal to do so had a direct impact on the adverse holding.

(2) The district court and the 2d Circuit also deprived the Petitioners of a meaningful right to petition for redress of grievances by depriving the Petitioners of an answer and court-compelled discovery. This is not to suggest that every dismissal under 12(b)(6) is inappropriate because of the absence of discovery opportunity.

Where, as here, the complaint, par 55 at A99 documents legitimate efforts by the litigants to procure prelitigation information with which to pursue and prove a grievance which have been blocked by the state officials who now are defendants in the litigation in question, it was and is an abuse of discretion on the one hand, and a deprivation of a meaningful right to petition for redress of grievances on the other, to dismiss the complaint under such circumstances. See: Lyons v Legal Aid Society, 58 F3d 1512 (2d Cir. 1995), cited in the main brief at p.15.

The municipal defendants take the position that because the petitioners did not conduct discovery before the 12(b)(6) motion was granted dismissing the complaint, that fact somehow

undercuts the Petitioners' position at this juncture. The complaint was dismissed before the interposition of an answer. After an answer is served the issues are by any admissions of assertions in the complaint.

For example, there are assertions in the complaint paragraph 51-54 at A98 which allege that the New York State Legislature did not provide for the exclusion, intend or have the power to exclude any retired member of the Police Deparrtment from the VSF benefit. Also there are assertions in paragraphs 41-43 of the complaint at A94 alleging forced disability retirement and lack of option, factors to which both the district court and the circuit court gave particular importance, and which in fact later led to the remand of the case of firefighter Velardi. To expect a litigant to conduct discovery prior to service of an answer which might or might narrow the issues requiring discovery borders on the bizarre.

Point II: This case is amenable to a sua sponte pre-argument reversal

A determination by this Court that refusal of other courts to accept the binding effect of a state's highest court's construction of state laws is a deprivation of due process and destructive of the constitutional right to petition for redress of grievances in a meaningful way is clearly beneficial on a nationwide

basis. Moreover it could well justify a sua sponte reversal as well as after briefing and argument.

The fact that the VSF is deferred compensation for work performed is almost dispositive in favor of the Petitioners upon remand. This, together with the refusal of the 2d Circuit to be bound by the Gagliardo definition and the denial of court-compelled discovery provides a generous abundance of reason to justify a reversal sua sponte.

BY REASON WHEREOF, the Petition should be granted.

Dated: Hauppauge, N.Y. July 13, 1998.

Respectfully Submitted:

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